No. 84-1513 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner

v.

DANTE CARLO CIRAOLO,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS, FIRST APPELLATE DISTRICT

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF ALABAMA, DELAWARE, GEORGIA, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA, MAINE, MASSACHUSETTS, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, OHIO, PENNSYLVANIA, SOUTH CAROLINA, VERMONT, VIRGINIA, WASHINGTON, AND WYOMING

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INTEREST OF AMICI CURIAE

Aerial surveillance is an important and effective tool of law enforcement in curtailing the cultivation and distribution of marijuana.[1] Statistics on the cultivation of marijuana underscore the interest of the amici curiae in

[1] DeFoor, Houston Police Department's Eye in the Sky, FBI L. Enforcement Bull., Sept. 1981 at 1, 2.

this area. Marijuana is the fourth largest cash crop in the United States following corn, soybeans, and wheat.[2] In 1981, the marijuana crop had a street value of 8.5 billion dollars.[3] Further, law enforcement agencies in the 50 states destroyed 3,802,927 cultivated marijuana plants, as well as, 9,178,283 wild marijuana plants in 1984.[4]

The success and repeated use of aerial surveillance as a police investigatory tool has created a new area of fourth amendment search and seizure analysis. The judicial system presently condones the use of warrantless aerial surveillance.[5] In deciding whether warrantless aerial surveillance constitutes a search under the fourth amendment, courts recognize that the fourth amendment requires that a balance be achieved between an individual's privacy interests and the general public's interest in law enforcement. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979); *Zurcher v. Stanford Daily*, 436 U.S. 547, 98 S.Ct. 1970 (1978). These cases recognize that an expectation of privacy is not reasonable merely because it is manifested objectively by means of active concealment. The expectation must be one that society is prepared to recognize as reasonable.

Thus, the amici curiae submit that in analyzing the propriety of warrantless aerial surveillance, the focus should be on both the observer and the observed: whether an accused actually expected privacy from the air; whether the surveillance method utilized was acceptable. The application of this standard to resolve warrantless

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[2] Grass was Never Greener, Time, Aug. 9, 1982, at 15.

[3] *Id., see also* The Marijuana Wars, Newsweek, Aug. 29, 1983 at 22 (estimates of the size of the American marijuana crop).

[4] U.S. Dept. of Justice Drug Enforcement Administration, Final Report, 1984, Domestic Cannabis Eradication/Suppression Program, Dec. 1984.

[5] *See, e.g., United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981).

aerial surveillance cases strikes a balance between the preservation of constitutionally guaranteed privacy and legitimate law enforcement techniques.

STATEMENT OF THE CASE

On September 2, 1982, a narcotics officer was informed, by means of an anonymous telephone message, that marijuana was growing in the backyard of the Respondent's residence. The plot of marijuana, which measured 15 x 25 feet and contained plants eight to ten feet in height, was enclosed in an inner ten foot fence, as well as, an outer six foot fence.

Subsequently, the officer chartered an airplane to view and to photograph the Respondent's property. At an altitude of not less than 1000 feet and without visual aids, the officer identified marijuana on the Respondent's property. Based upon the information gathered from the informant and from the sightings in the plane, the officer obtained a search warrant to search the Respondent's property. Thereafter, the warrant was executed. Seventy-three marijuana plants were seized from the Respondent's yard.

SUMMARY OF THE ARGUMENT

To determine whether a search has occurred in a warrantless aerial surveillance case, a standard of reasonableness should be adopted—a standard which properly focuses on both the observer and the observed.

ARGUMENT

In *United States v. Oliver*,[6] ___ U.S. ___, 104 S.Ct. 1735 (1984), the Supreme Court revitalized the "open fields"

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[6] In *Oliver*, two police officers acting on tips that marijuana was growing on a farm, walked toward the suspect field passed a locked gate with a "no trespassing" sign, ignored verbal warnings, and found marijuana plants.

doctrine set forth in *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445 (1924). This doctrine permits police officers, without a warrant, to enter and search an open field which is not within the curtilage of a defendant's home. In a section of the opinion, the "open fields" rule was discussed in light of the "reasonable expectation of privacy" test established in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967). The Court reaffirmed that the fourth amendment "does not protect the merely subjective expectations that society is prepared to recognize as reasonable." ___ U.S. at ___, 104 S.Ct. at 1740, quoting *Katz*, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring). The Court further stated that the rule in *Hester* "may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." ___ U.S. at ___, 104 S.Ct. at 1741. *Oliver*, however, did not delineate the scope of the curtilage exception to the "open fields" doctrine nor did it address the propriety of aerial surveillance of areas within or near the curtilage but open to view from the air.

The *Oliver* Court, however, citing Ninth Circuit and other lower court precedent noted that the "public and police lawfully may survey lands from the air." ___ U.S. at ___, 104 S.Ct. at 1741, citing in n. 9, *United States v. Allen*,[7] 675 F.2d 1373, 1380-1381 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981); *United States v. DeBacker*, 493 F.Supp. 1078, 1081 (W.D.Mich. 1980). It is well, then, to resolve the issue whether of warrantless aerial surveillance of an area within or near the curtilage constitutes a search in light of *Katz*.

[7] In *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981) the Court ruled that under the facts of that case overflights did not constitute an unreasonable intrusion upon the Defendants' reasonable expectations of privacy. The Court relied principally upon the unique characteristics of the area observed. Coast Guard helicopters, the Court noted, "routinely traversed the nearby air space for several reasons, including law enforcement." *Id.* at 1381. Further, under those facts "any reasonable person, cognizant of the ranch's proximity to the coastline and the Coast Guard's well known function of sea-coast patrol and surveillance, could expect that government officers conducting such flights would be aided by sense-enhancing devices." *Id.*

Katz established the reasonable expectation of privacy as the touchstone of fourth amendment analysis. The *Katz* decision has generally been understood in terms of Justice Harlan's two prong test for protected expectations of privacy: (1) "that a person have exhibited an actual (subjective) expectation of privacy" and (2) "that the expectation be one that society is prepared to recognize as 'reasonable'." Such analysis invites a careful examination of the totality of the circumstances to determine whether the person whose place is searched has manifested an expectation of privacy that society is prepared to recognize as reasonable.

The amici curiae submit that this fourth amendment question must be examined by assessing the nature of the particular aerial surveillance and the likely extent of its impact on an individual's sense of security, balanced against the utility of the conduct as a technique of law enforcement. The optimum approach, then, is to focus on the observer and the observed: (1) whether the accused actually expected privacy from the air; (2) whether the surveillance method utilized was acceptable.[8] A justifiable

[8] This formulation incorporates the "reasonable expectations" test yet still focuses on appropriate policy considerations. In *Dow Chemical Co. v. United States*, 536 F.Supp. 1355 (E.D. Mich. 1982), *cert. granted*, ___ U.S. ___ (June 10, 1985), the court incorporated social concepts into the "reasonable expectations" test. The *Dow* court observed that the "essence of the first prong of the test is that the party must have acted in such a way that it would have been reasonable for him to expect that he would not be observed ..... Therefore, the court must look to objective manifestations of any claimed privacy expectation." *Id.* at 1364. In determining whether an expectation is one society will accept as reasonable, the *Dow* court reversed the question by examining the reasonableness of the government's actions.

expectation of privacy from airborne observation can be determined by considering: (1) the obviousness of the object from the air;[9] (2) the location of the property observed;[10] and (3) the frequency of air traffic over the property.[11]

If a subjective expectation of privacy has been established, the focus of the inquiry should shift to the nature of the investigatory techniques utilized by the police. Factors such as the altitude of surveillance, the use of technological viewing aids in the observation, and finally, the frequency and duration of aerial surveillance should be considered.[12] This qualified "open view"[13] approach strikes a satisfactory balance between the use of

[9] *Dean v. Superior Court*, 35 Cal. App.3d 112, 110 Cal. Rptr. 585 (1973); *People v. St. Amour*, 104 Cal. App.3d 886, 163 Cal. Rptr. 187 (1980); *State v. Stachler*, 58 Hawaii 412, 570 P.2d 1323 (1977).

[10] *People v. Sneed*, 32 Cal. App.3d 535, 108 Cal. Rptr. 146 (1973).

[11] *United States v. Allen*, 675 F.2d 1373 (9th Cir. 1980), *cert. denied*, 454 U.S. 833 (1981); *United States v. Mullinex*, 508 F.Supp. 512 (E.D.Ky. 1980); *United States v. DeBacker*, 493 F.Supp. 1078 (W.D.Mich. 1980); *State v. Layne*, 623 S.W.2d 629 (Tenn. Cr. App. 1981).

[12] *See, e.g., People v. Sneed*, 32 Cal. App.3d 535, 108 Cal. Rptr. 146 (1973) (warrantless aerial surveillance at 20-25 feet is unconstitutional); *State v. Stachler*, 58 Hawaii 412, 570 P.2d 1323 (1977) (warrantless visual surveillance unconstitutional when highpowered binoculars used); *State v. Knight*, 63 Hawaii 90, 621 P.2d 370 (1980) (continual aerial surveillance for prolonged time periods could be a consideration although not relevant to instant case. However, devices such as highpowered binoculars, telescopic cameras, and infra-red telescopes only enhance what could be seen with the naked eye and, therefore, their use has been held not to constitute a fourth amendment search. *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081 (1982); *see also United States v. Bassford*, 601 F.Supp. 1324 (D.Maine 1985).

[13] The notion of "open view" originated in *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 521 (1967) (Harlan, J., concurring). Justice Harlan explained that something exposed to the open view of a member of the public is not protected under the fourth amendment because no intention to keep it private has been exhibited. *See United States v. Lace*, 669 F.2d 46, 50 (2d Cir. 1982).

an effective investigatory tool and the preservation of constitutionally guaranteed privacy. If a defendant has established an expectation of privacy, the reasonableness of the warrantless observations should be considered.

The public and police may lawfully survey lands from the air. During aerial surveillances, police are in a place where they have a right to be. Merely because contraband is planted in an area not observable from ground level should not foreclose all surveillance of the area.[14] Indeed, aerial surveillance is a viable and reasonable technique which causes minimal intrusion yet allows police to corroborate informants' tips as a means of establishing sufficient probable cause to obtain a search warrant. In *Dean v. Superior Court*, 35 Cal. App.3d 112, 117, 110 Cal. Rptr. 585 (1973), the court noted that agriculturists do not conceal their wheat or oat fields from aerial view. Marijuana fields/plots deserve no greater protection. To determine whether a search has occurred in a warrantless aerial surveillance case, a standard of reasonableness should be adopted—a standard which properly focuses on both the observer and the observed. The advantage to the use of this approach is that by examining the conduct of police, a court is forced to consider the effect such conduct has upon society's "sense of security." In this way, citizens will be allowed to be both protected by and from airborne observation.

[14] In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861 (1979), the Court ruled that, in some cases, expectations of privacy may be unreasonable if society is not prepared to recognize them as legitimate—regardless of the efforts of the person to keep his activity hidden.

CONCLUSION

For the foregoing reasons, the decision of the California Court of Appeals, First Appellate District should be reversed.

Respectfully submitted,

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